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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sperry Corporation
File: B-225492, B-225492.2
Date: March 25, 1987

DIGEST

1. An evaluation criteria designating cost/price as an evaluation factor in a request for proposals soliciting fixed-price proposals means the lower proposed fixed price will receive the most credit in the evaluation; cost realism is not the evaluation factor and a cost analysis is not required where there is adequate price competition. A low fixed-price offeror cannot be rated lower or downgraded in the price evaluation for source selection by virtue of its low price.
2. Where two acceptable offerors independently submit fixed-price proposals under a request for proposals, adequate price competition exists such that no cost analysis, but only a price analysis, need be performed on the proposed price proposals.
3. Under GAO's Bid Protest Regulations, a protester must protest within 10 working days of when it is informed of its basis for protest; a protester may not wait until it obtains under the Freedom of Information Act additional information pertaining to the protest before filing the protest.
4. A protest that certain allegedly required information was not submitted by the awardee with its proposal is timely filed under GAO's Bid Protest Regulations, where the protester diligently pursues obtaining a copy of the information under the Freedom of Information Act, and the agency does not supply the information, erroneously tells the protester that it has already supplied him with the information and finally admits that the information was not submitted by the awardee, since the protester filed the protest within 10 working days of receiving the agency's admission.
5. The awardee's failure to submit pricing for data items on the Contract Data Rights List (CDRL), DD Form 1423, with its best and final offer for the contract does not adversely affect the acceptability or price of the proposal or the

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government's rights under the contract, where the awardee submitted acceptable CDRL pricing data with the initial proposal, since CDRL pricing data is not part of the contract, the cost of data items is included in contract line item prices, and the purpose for obtaining such data prices is to evaluate the cost of data items in terms of their management or product or engineering value to the government.

DECISION

Sperry Corporation protests the award of a fixed-price contract No. N61339-86-C-0148 to Gould Inc. by the Naval Training Systems Center, Orlando, Florida, for a Trident Submarine ship control team trainer with associated documentation, parts and support services with an option for an additional trainer. After receiving the agency report on the protest and additional documentation under the Freedom of Information Act (FOIA), Sperry supplemented this protest with additional protest allegations.

We dismiss the protest in part and deny the remainder.

Four proposals were submitted in response to the request for proposals (RFP) and only Sperry and Gould were found in the competitive range. After discussions with these two offerors and best and final offers (BAFO), Gould was awarded the contract on September 12, 1986.

ALLEGED COST ANALYSIS REQUIREMENT

After being debriefed, Sperry timely protested the award to this Office on November 14, 1986. Sperry contended that the Navy did not perform a detailed cost analysis on Gould's fixed-price proposal as required by the evaluation scheme set forth in the RFP and thus did not make an award in accordance with the RFP. Sperry claims that the Navy considered Gould's proposed low price in making the award selection, but the RFP required that "cost realism" be evaluated as the cost portion of the award evaluation scheme.

The RFP required the submission of detailed cost and supporting data which would be evaluated to determine if the proposed prices were reasonable for the effort involved. Moreover, the RFP stated that unrealistically low priced proposals would "be deemed reflective of an inherent lack of technical competence or indicative of failure to comprehend the complexity and risks of the contract requirements and may be grounds for rejection of the proposal." The RFP weighted technical design evaluation criteria as 40 percent of the

total evaluation weight and integrated logistics support and cost as 30 percent each and provided:

"The Government desires to make award to that offeror submitting the 'best value' proposal. The 'best value' award shall be to that offeror submitting a better technical proposal with appropriate considerations given to cost/price and other factors"

The record shows that the Navy combined technical and price factors into a single formula to determine the "best value" for award selection. Gould received a total technical score of 519.3 points after the evaluation of the BAFO's, and proposed a fixed price of \$8,400,176 while Sperry's technical score was 513.9 points with a price of \$11,159,657. Consequently, Gould received the top score under the "best value" formula and the award.

Where fixed-price contracts are solicited, "cost realism" ordinarily is not considered in the evaluation since a firm fixed-price contract provides for a definite price and this contract type places upon the contractor the risk and responsibility for all contract costs and resulting profit or loss. Corporate Health Examiners, Inc., B-220399.2, June 16, 1986, 86-1 C.P.D. ¶ 552. However, agencies, in their discretion, may provide for a cost realism analysis in the solicitation of firm fixed-priced proposals for such purposes as measuring an offeror's understanding of the solicitation requirements. Id.

In this case, the agency reserved the right to downgrade technical proposals where the offeror proposed unrealistically low prices. Detailed cost backup to the proposed prices was solicited, furnished, evaluated and discussed with the offerors. The Navy did not find Gould's price was unrealistically low and did not downgrade Gould's technical proposal because of its low price.

Although no cost analysis of the price proposals was performed, the Navy found that Gould's proposed BAFO price was "fair and reasonable" based upon a price analysis. The Navy did not perform a cost analysis because it found there was adequate competition to indicate that Gould was proposing a fair and reasonable price. See Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 15.804-3(b); 15.805-1(b) (1986). Since two acceptable offerors independently contended for award, the Navy reasonably found that adequate price competition existed and the extent of cost or price analysis was a

matter left to its discretion. See U.S. Nuclear Inc., 57 Comp. Gen. 185, 190 (1977), 77-2 C.P.D. ¶ 511.

We do not agree with Sperry that the RFP required a detailed cost analysis of the fixed-price proposals. Contrary to Sperry's contention, cost/price as used in the award evaluation scheme in this RFP means the lower fixed price receives the most credit in the evaluation; cost realism is not the evaluation factor. See Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 C.P.D. ¶ 79; Corporate Health Examiners, Inc., B-220399.2, supra. The fact that detailed cost backup was solicited does not imply that cost realism is the criterion for evaluating the proposed fixed prices. Corporate Health Examiners, Inc., B-220399.2, supra. In any case, we have held that a low fixed-price offeror cannot be rated lower or downgraded in the price evaluation for source selection by virtue of its low price. Litton Systems, Inc., et al., 63 Comp. Gen. 585 (1984), 84-2 C.P.D. ¶ 317; Ball Technical Products Group, B-224394, Oct. 17, 1986, 86-2 C.P.D. ¶ 465. Consequently, although unrealistically low prices could have been considered in the technical evaluation, Gould's low fixed price could not be given less credit in the price evaluation because of its lowness. Therefore, this protest allegation is denied.

SUPPLEMENTAL PROTESTS

After receiving the agency report on the protest and certain responses to FOIA requests, on December 24, 1986, Sperry submitted a number of additional protest bases to our Office. Sperry protested that (1) Gould's technical proposal does not meet the solicitation requirements in six material respects; (2) the Navy may have conducted improper oral discussions with Gould after the Navy's BAFO request and prior to the receipt of BAFO's; (3) Gould failed to propose prices on every contract line item number (CLIN) in the contract schedule as required by the solicitation; and (4) Gould failed to propose prices on any exhibit line item number (ELIN) for the data items on the Contract Data Requirements List (CDRL), Department of Defense (DD) Form 1423, an exhibit incorporated into the RFP. On February 3, 1987, after receiving other documents under its continuing FOIA requests, Sperry protested that discussions were conducted with Gould after award to obtain responses to certain questions asked in discussions prior to receipt of BAFO's.

The Navy claims that the December 24 and February 3 protests are untimely filed under our Bid Protest Regulations. We agree with the Navy that some of Sperry's supplemental protest bases are untimely. Sperry's other supplemental protest bases are timely filed, but without merit.

ALLEGED NONCOMPLIANCE WITH TECHNICAL REQUIREMENTS

Sperry's protest that Gould's technical proposal does not meet the solicitation requirements is untimely because it was filed more than 10 working days after Gould should have been aware of this potential basis for protest. Sperry argues that the protest is timely because of the piecemeal manner in which the Navy furnished Sperry with Gould's technical proposal under FOIA. However, the record shows that the portions of the Gould technical proposal on which Sperry bases its protest were furnished to Sperry on October 29, 1986. Consequently, this protest basis filed more than 10 working days later is untimely under our Bid Protest Regulations and is dismissed. 4 C.F.R. § 21.2(a)(2) (1986); Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., B-215303.3, B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394.

ALLEGED IMPROPER DISCUSSIONS

Sperry's December 24 protest that improper oral discussions were conducted after the request for BAFO's is also untimely. This contention is based solely upon references in Gould's BAFO to two telephone conversations between Gould and Navy representatives. Sperry contends that the summaries of the content of these conversations in Gould's BAFO demonstrates that they were improper discussions which gave Gould an unfair competitive advantage.

Since the record shows that Sperry received a copy of Gould's BAFO on October 29, 1986, in response to its FOIA request, its December 24 protest of this matter is untimely filed under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2). Sperry argues that it did not protest until it ascertained on December 11, 1986, under FOIA that the Navy had no record of the two telephone conversations. However, where a protester is already reasonably aware of a protest basis, it may not wait until it obtains additional information pertaining to the protest before filing the protest. Trend Construction & Associates--Reconsideration, B-222817.2, May 8, 1986, 86-1 C.P.D. ¶ 445. Consequently, this protest basis is dismissed.

The Navy also contends that Sperry's February 10, 1987, protest that improper post-award discussions were conducted is untimely. We disagree.

On January 20, 1987, pursuant to its continuing FOIA requests, Sperry received copies of Gould's answers to questions Nos. 39 through 42 that were asked during written discussions prior to the request for BAFO's, together with a letter dated January 7, 1987, from Gould supplying a copy of

these answers to the Navy. The answers had not been in the earlier documents that had been supplied Sperry under FOIA.

The Navy contends that since Sperry's protest is based upon the absence of these particular answers in earlier documents supplied to Sperry, the protest is untimely since the absence of these answers was evident. The Navy's timeliness argument is strained and misconstrues Sperry's protest. Sperry is actually protesting that these answers had apparently been first supplied the Navy by Gould on January 7, 1987, as evidenced by Gould's forwarding letter, and thus constituted improper post-award discussions of matters that should have been discussed and resolved prior to the submission of BAFO's. Since Sperry protested this matter within 10 working days of when it became aware that Gould had supplied a copy of these answers after award, Sperry's protest is timely under our Bid Protest Regulations, 4 C.F.R § 21.2(a)(2).

However, this protest has no merit. The Navy has furnished an affidavit of a Navy employee who participated in the technical evaluation stating that the Gould answers to questions 39 through 42 were received and evaluated during pre-BAFO discussions and that he had a copy of these answers in his files. Sperry has not shown that these answers were not properly submitted by Gould as sworn by the Navy affiant. Therefore, the contention that improper post-award discussions were conducted is denied.

CLIN PRICING

Sperry's protest of Gould's alleged failure to price all CLIN's is untimely. The record shows that Sperry should have become aware of Gould's failure to specifically price the CLIN's when it was furnished a copy of Gould's contract on October 9, 1986, and Gould's BAFO on October 29, 1986. Consequently, Sperry's December 24 protest filed more than 10 working days later is untimely under our Bid Protest Regulations, 4 C.F.R § 21.2(a)(2).

Sperry argues that it did not protest at that time because it was still attempting to obtain Gould's ELIN pricing (discussed below) under FOIA. Sperry argues that since many of Gould's unpriced CLIN's were for data items listed on the CDRL's for which it had not yet obtained ELIN pricing, it was reasonable to first obtain the ELIN's to ascertain if there was a protest basis. Sperry explains that if the ELIN's existed for the data encompassed by the unpriced CLIN's, this would undercut this protest basis. However, as discussed above, a protester may not wait until it obtains additional information under FOIA pertaining to the protest before

filing if it is already reasonably aware of the protest basis. Trend Construction & Associates--Reconsideration, B-222817.2, supra. Therefore, this protest basis is dismissed.

ELIN PRICING

Sperry's protest concerning Gould's alleged failure to provide ELIN pricing for the CDRL's is timely. The ELIN pricing was reasonably encompassed by Sperry's initial September 29, 1986, FOIA request for Gould's contract and proposal. When the ELIN prices were not included in the documents supplied by the Navy under FOIA, Sperry on October 22, 1986, specifically requested these prices. On October 29, the Navy erroneously advised Sperry that it had already provided Sperry with the ELIN pricing. On October 31, Sperry again requested the ELIN pricing. Finally, on December 5, the Navy admitted that Gould had not provided ELIN prices for the contract with its BAFO. Sperry states that it did not receive this advice until December 11. Consequently, Sperry's December 24 protest of Gould's failure to provide ELIN pricing was filed within 10 working days of when it received the Navy's admission. Therefore, Sperry's protest of this point is timely since it diligently and reasonably pursued this information under FOIA and protested as soon as it became aware of this protest basis. E.C. Campbell, Inc., B-222197, June 19, 1986, 86-1 C.P.D. ¶ 565.

However, this protest has no merit. The ELIN prices on the CDRL are those prices inserted on the DD Form 1423 (Department of Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 253.303-70-DD-1423) for individual items of data supplied under the contract. The CDRL's describe each item of contract data and specify such requirements as when, how many copies, how often, and where the data item is to be delivered. The RFP required offerors to state an estimated cost for each data item on the CDRL's and warned that if an offeror failed to enter the required price information on the DD Form 1423 as part of its submission, and failed to do so on request, its offer may be rejected.

Our review of the record reveals that Gould submitted pricing data on the CDRL's in its initial cost proposal. However, the Navy admits that Gould submitted no specific prices for the CDRL's incorporated as exhibits in the contract. The Navy explains that Gould's prior submissions were of sufficient merit for Gould to be included in the competitive range and that Gould's pricing of the CDRL's had been determined fair and reasonable. The Navy contends that the ELIN's did not need to be separately priced in the contract,

inasmuch as these costs are also included in the CLIN's for the data items.

Sperry argues that the Navy was required to solicit and evaluate ELIN pricing in the BAFO's, inasmuch as Gould lowered its initial proposed price and there were several significant changes to the CDRL's after initial proposals had been evaluated. In this regard, Sperry notes that a BAFO supersedes previous acceptable proposals and contends that the technical acceptability of a BAFO cannot be based upon the acceptability of previous offers. Sperry contends that individual ELIN prices are contractually significant so the government knows the price of each data item in administering the contract.

We find that although the data descriptions and delivery instruction portion of the CDRL's are clearly contract requirements, the individual ELIN prices are not intended to be part of the contract. In this regard, paragraph 2 of the DD Form 1423 containing the CDRL's states:

"2. The contractor agrees that, regardless of whether he has made any [price] entries . . . and regardless of what those entries are, he is obligated to deliver all the data listed hereon, and the price he is to be paid therefore is included in the total price specified in this contract."

As Sperry admits, the contract CLIN's include all ELIN costs.

Further, paragraph 3 of the DD Form 1423 states that the ELIN prices "will not be separately used in the evaluation of offers." Indeed, the purpose of the government's soliciting such pricing data is "to evaluate the cost to the Government of data items in terms of their management, product or engineering value." DFARS, 48 C.F.R. § 215.871(a) (1986). That is to say, a primary purpose of soliciting such pricing data is for the government to assess whether it really needs solicited data items when it is made aware of their costs. Indeed, the estimated prices on the DD Form 1423 are not to be included in a contract, see DFARS, 48 C.F.R. § 215.871(d); only the CDRL descriptions and delivery instructions are included in the contract. DFARS, 48 C.F.R. § 204.7103-1.

Therefore, Gould's failure to submit individual ELIN pricing does not adversely affect the acceptability of its proposal; Gould had already submitted in its initial proposal sufficient ELIN pricing data to satisfy the Navy's requirements. Moreover, since the data covered by the ELIN prices is part of the CLIN prices, neither Gould's price nor the

government's rights under the contract are affected by Gould's failure to separately price the ELIN's in its BAFO.

Sperry complains that during discussions it was requested to submit further information concerning its CDRL's, while Gould was allowed to omit ELIN prices in its BAFO. However, there is no requirement that an agency hold the same kind of detailed discussions with all offerors, inasmuch as the weaknesses and deficiencies, if any, in their proposals may vary. Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., B-215303.3, B-215303.4, supra. In any case, it appears that the Navy perceived discrepancies in both Gould's and Sperry's CDRL information and conducted discussions with both offerors to satisfactorily resolve these deficiencies. Therefore, this protest basis is denied.

Sperry's protest is dismissed in part and the remainder is denied.

for Seymour Efron
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General Counsel